



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Alan Scott Industries

File: B-229663

Date: February 26, 1988

DIGEST

Allegation that quality assurance testing provision in solicitation is improper because it has been used by the agency to eliminate unwanted contractors is without merit where agency reports that testing is used only where there have been problems with specific medical instruments, and there is no evidence in the record that the testing clause has been applied arbitrarily or unfairly under prior contracts.

DECISION

Alan Scott Industries (ASI) protests the award of any contract under solicitation No. DLA120-88-B-0083, issued by the Defense Logistics Agency (DLA) for medical instruments (angular bandage scissors). ASI contends that a solicitation provision--Clause E009, entitled "Testing at Government Laboratory"--which provides for testing to ensure compliance with specification requirements, was included in the solicitation solely for the purpose of eliminating "unwanted contractors." ASI claims that the contracting activity has not applied this clause or prior similar clauses to any established regular dealers. The firm concludes that the clause should be eliminated. We deny the protest.

ASI previously challenged the application to it of a similar testing provision on the ground that the firm had supplied the requested item in compliance with the specifications and that requiring such testing therefore would result in unnecessary additional costs. We denied the protest on the basis that a contracting agency's responsibility for determining its actual needs extends to determining the type and amount of testing necessary to ensure product compliance with the specifications, and that we would not question such a determination where the protester fails, as did ASI, to make a clear showing that the determination was arbitrary or

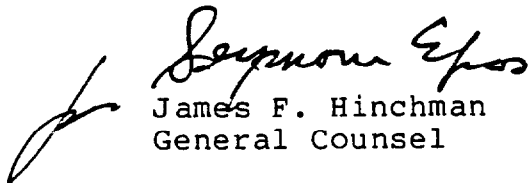
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capricious. See Alan Scott Industries, B-228756.2, Nov. 6, 1987, 87-2 CPD ¶ 460, aff'd, B-228756.3, Dec. 2, 1987, 87-2 CPD ¶ 536.

ASI argues in its protest here that DLA included the provision for testing solely to exclude ASI from the competition. DLA reports in this regard that the testing clause is included in all solicitations for critical medical items to be used in or on the human body (such as the item here), and is invoked where unresolved quality problems have been encountered in prior procurements for the same item. For example, according to the agency, the clause was previously invoked under contracts with ASI and five other firms for the supply of Allis Tissue Forceps because all forceps purchased under a prior contract had been defective and thus had to be scrapped.

DLA's position appears reasonable on its face and, ASI's unsupported assertions aside, the record contains no evidence that DLA's determination to include a provision for quality assurance testing in fact was motivated by a desire to exclude certain firms from competing, or that the testing provision has been applied arbitrarily under prior contracts such that it reasonably might dissuade a firm from competing under this procurement.

The protest is denied.


James F. Hinchman
General Counsel